IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 807

MALCOLM H. MACBRYDE, JR., INDIVIDUALLY, AND AS ADMINISTRATOR C. T. A. OF LEROY PARKER, DECEASED, AND MARY D. WINDER, INTERVENER,

Petitioners,

vs.

ALICE D. PARKER, EXECUTRIX OF ROBERT B. PARKER, DECEASED, AND ALSO INDIVIDUALLY, AND ROBERT B. PARKER, JR.

No. 808

MALCOLM H. MACBRYDE, JR., INDIVIDUALLY, AND AS ADMINISTRATOR C. T. A. OF LEROY PARKER, DECEASED, AND MARY D. WINDER, INTERVENER,

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JOHN W. DAVIDGE, INDIVIDUALLY, AND AS TRUSTEE OR ASSIGNEE OF ELEANOR RIDGELY PARKER AND AS EXECUTOR OF HER ESTATE, AND CATHERINE RIDGELY BROWN.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

JAMES MORFIT MULLEN,
Counsel for Petitioners.

The Daily Record Co. Print, Baltimore.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and His Associate Justices of the Supreme Court of the United States:

Your petitioners, Malcolm H. MacBryde, Jr., individually and as Administrator c. t. a. of LeRoy Parker, deceased,

and Mary D. Winder, Intervener, respectfully pray that writs of certiorari issued to review the decrees and decision of the United States Circuit Court of Appeals for the Fourth Circuit, entered on December 30, 1942.

A joint petition is filed in these two cases, because in both, the issue is the same, and the Circuit Court of Appeals filed a single opinion. Separate decrees were entered.

The decrees and decision here sought to be reviewed, reversed the United States District Court for the District of Maryland, which by the Honorable W. Calvin Chesnut, had on June 9, 1942, entered an opinion construing a Maryland will. Final decrees were entered on August 17, 1942 and on October 12th, 1942, from which the respective appeals below were taken to the Circuit Court of Appeals (numbered therein 4997 and 5019) (R., pp. 31 and 52).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240, of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C. Title 28, section 347). The decrees of the United States Circuit Court of Appeals for the Fourth Circuit to be reviewed were entered on December 30, 1942 (R., pp. 46 and 56).

REASON FOR GRANTING THE WRITS.

The Circuit Court of Appeals for the Fourth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

The District Court followed the only applicable Maryland decision. The Circuit Court of Appeals refused to adhere to that case; but followed two other Maryland decisions. The latter Court characterizes those two cases inaccurately, as later referred to in the brief. A correct char-

acterization of those two cases shows that they are entirely inapplicable.

The Circuit Court of Appeals made a further ruling based on an authority quoted from by it. This quotation (amplified later with text—quoted in our brief) shows that the correct law is the very opposite of that applied by the Circuit Court of Appeals.

Petitioners aver that the Circuit Court of Appeals decided this case on two grounds more or less alternative in their nature (R., p. 46), both of which are in conflict with the Maryland Law, and neither of which is the law anywhere else. Such rulings should not stand as an exposition of Maryland law, to be followed by Federal Courts in like cases.

STATEMENT OF MATTER INVOLVED.

Mary Donaldson, late of Baltimore City, by a will probated in Baltimore City, left a trust fund to her niece, Sara J. Parker, for life. She further provided in her will, a power to this life tenant, Sara J. Parker, to dispose of this corpus "to her brothers and sister of the whole blood in such proportions as she may designate by her last will and testament" (R., p. 1).

When this will was probated there were four subjects for appointment (three brothers and one sister). One brother died. This made him (and his representatives) ineligible for appointment. Sara Parker later made a will giving the fund "in equal parts" to the three remaining subjects. A second subject died before the life tenant. She did not change her will (R., p. 2).

The District Court said the power was validly exercised in favor of the two survivors, because the death of the

other two had made them ineligible for appointment (Opinion, R., p. 8).

The Circuit Court of Appeals reversed the District Court. It made two alternative determinations (Opinion, R., p. 36).

(1) That the power was non-exclusive and the donee (Sara Parker) could not omit any of the four subjects. Death of the first subject made him ineligible—nevertheless, the omission to name him in exercising the power created a total invalidity in its exercise.

(2) That the death of one of the *three* subjects named in Sara Parker's will caused a lapsing of the provision for him. This lapsing, or partial invalidity in the exercise of the power, caused the whole exercise to be void.

QUESTIONS PRESENTED.

We here reverse the order of the two propositions so as to handle the Maryland decisions more conveniently.

(1) Whether, when a special power of appointment exercisable by will, created by the will of a Maryland resident, and probated in Maryland, has been exercised in favor of three subjects, two of whom are eligible for appointment;—such exercise was rendered totally invalid because one of the subjects (originally eligible, when the donee of the power made her will) later became ineligible by reason of death prior to the donee.

(2) Whether, when a special power of appointment exercisable by will, originally conferred by the will of a Maryland resident and probated in Maryland, is a non-exclusive power (so decided by the Circuit Court of Appeals and assumed, but not conceded by petitioners to be such) with four possible subjects for appointment, and is

exercised by appointing the only three subjects eligible when the will exercising the power was executed;—this exercise of the power is totally void, merely because the donee did not include in her exercise of the power, a fourth subject who died before she made her will, and who thus was concededly ineligible.

Importance of the Question of Local Law.

The testatrix here used a customary form to create a special power of appointment by will. Originally four persons were eligible subjects for appointment. Two died before the donee of the power. The donee omitted one entirely from her will. She included the other one. Death disqualified both of them. The Circuit Court of Appeals said the power as exercised was totally invalid, *first*, because one ineligible appointee was excluded, and, *second*, because the other ineligible appointee was included. Such a decision means that if any appointee predeceases the donee, the power is impossible of execution. This is not the Maryland Law.

There can be no question now, but that the construction of the will here involved is a matter in which the Maryland testamentary law is controlling:

Erie R. R. v. Tompkins, 304 U. S. 65.
Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202-208/9.
Fidelity Trust Co. v. Field, 311 U. S. 169.

The Maryland Law in Conflict with the Decision Sought to be Reviewed.

The District Court upheld the exercise of the power in favor of the two surviving appointees upon the clear authority of a decision by the Court of last resort in Maryland—

Graham v. Whitridge, 99 Md. 248.

We quote the following from the opinion of His Honor, Judge Chesnut in the District Court, in which he commented upon and quoted from this Maryland decision:

> "In the course of the opinion the late Chief Judge McSherry, whose depth of legal learning and power of forceful exposition was well known in Maryland, referred with approval to Sugden on Powers, Vol. 2, p. 102—
>
> 'to the effect that the well appointed portions will stand and the appointees of such well appointed portions will not be excluded from shares of the unappointed part if they belong to the class which takes' ". (R., p. 19).

Petitioners claim that the real controversy in this case below pertained to other phases of the two wills here involved; and that the main point on which the Circuit Court of Appeals reversed the District Court is one about which His Honor Judge Chesnut said:

> "It was suggested here by counsel for the estate of Robert Parker that if the appointment of Robert was invalid, the exercise of the appointment might be held invalid as a whole as in these Maryland cases, but I do not understand that this argument was seriously pressed and I think there is no reasonable basis for accepting it as sound". (R., p. 20).

WHEREFORE, your petitioners submit that this petition for the writs of certiorari should be granted as prayed.

JAMES MORFIT MULLEN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRITS FOR CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit, here sought to be reviewed, will be reported as *Parker v. MacBryde,* 132 Fed. 2nd — (R., p. 37). The District Court's opinion is reported as *MacBryde v. Burnett,* 45 Fed. Supp. 451 (R., p. 8).

This same case has been reported in other proceedings to determine the amount of the corpus, not here involved, reported as *MacBryde v. Burnett,* 44 Fed. Supp. 833, affirmed on appeal by the Circuit Court of Appeals for the Fourth Circuit, as *MacBryde v. Burnett,* 132 Fed. 2nd —, decided December 30, 1942.

JURISDICTION.

The ground upon which review is here sought by way of certiorari is fully stated in the petition (supra, p. 2). Jurisdiction was obtained in the District Court by diversity of citizenship, with the requisite amount in controversy. Some of the defendants moved to dismiss, for lack of jurisdiction, because of omitted parties. The motions were fully argued and were overruled. The opinion rendered by the District Court on this point is reported as *MacBryde v. Burnett,* 41 Fed. Supp. 661. There was no appeal on this point.

STATEMENT OF FACTS.

The facts are not in dispute. The fund here involved was originally created by the will of Mary Donaldson probated in the Orphans' Court of Baltimore City in 1920. By

the second paragraph of the will the testatrix bequeathed to her niece, Sara J. Parker, the

> "sum of $10,000 for and during her natural life and after her death I bequeath the said $10,000 to her brothers and sister of the whole blood in such proportions as she may designate by her last will and testament, but should she die intestate the said sum of money shall be divided among them equally." (R., p. 1).

The estate, when distributed, was not sufficient to pay all bequests in full. This trust fund was distributed as approximately $7,800. The corpus was never in fact paid to the life tenant, Sara J. Parker. Mary Donaldson's administrator invested it, held the corpus and paid the income to the life tenant. When she died, it had increased to approximately $37,000, which is the fund here at issue. This corpus was determined and realized by the other proceedings referred to above.

In 1920, there were three brothers of the whole blood—Henry, Robert and LeRoy, and one sister of the whole blood, Mary D. Winder (R., p. 4).

Henry died in 1925. He was childless. His widow survived him, but she died within a few months. John W. Davidge, the widow's executor and assignee, claims a one-fourth share for Henry. The facts as to the devolution of Henry's estate as well as his widow's will are in the Record, p. 4 and p. 50.

The life tenant, Sara J. Parker, in 1927 made a will which provided—

> "The fund of $10,000 under the will of my aunt, Mary Donaldson (which said will is now of record among the records of the Orphans' Court of Baltimore City), which I was to enjoy for life with the right of disposition to my brothers, and sister at my death, I

give and bequeath in equal parts to my brothers, LeRoy Parker and Robert B. Parker, and my sister, Mary D. Winder." (R., p. 2).

Robert Parker died August 2, 1940. He left a widow and a son. His widow as executrix and residuary legatee claims a share of this fund. Robert's will is in the Record, p. 7.

Sara J. Parker, the life tenant, died November 12, 1940. One brother, LeRoy (who has since died) and one sister survived her.

Judge Chesnut in the District Court held that the two survivors took the entire estate, as they were the only eligible appointees. The Circuit Court of Appeals in an opinion by Judge Soper, reversed this determination, and awarded the fund in four equal parts, one to each of the surviving brother and the surviving sister, and one to each of the personal representatives of the two pre-deceased brothers.

SPECIFICATION OF ERRORS.

Petitioners specify only one error—that the Circuit Court of Appeals held the entire exercise of the power of appointment invalid. Petitioners urge that the power was validly exercised under Maryland Law in favor of the only eligible appointees. They claim that these two appointees take the entire estate.

ARGUMENT.

The contentions of the petitioners are summarized thus:

I. The death of two appointees otherwise eligible for a share of the Donaldson Estate prior to Sara Parker, made them (and their representatives) ineligible to take.

II. The invalidity in the exercise of the power due to the inclusion of one ineligible appointee, and the exclusion of another ineligible appointee (if this could possibly be an invalidity) was only partial. The remaining appointments to the two eligible subjects were valid and enforceable.

III. The power was exercised; and under the will of Sara Parker, the estate went "in equal parts" entirely to the only eligible appointees.

I.

Effect of Death of Subjects before Donee of the Power.

Two brothers of the life tenant (the donee of the power) predeceased her. It is undoubtedly the universal law that this made them ineligible subjects for appointment. The District Court quoted the relevant authorities (R., pp. 11-13). The Circuit Court of Appeals referred to this proposition as "not questioned by the appellants" (respondents here) (R., p. 39). Maryland has extended this doctrine by deciding that upon the death of such appointees, the donee cannot name children of the deceased subjects in their place.

Smith v. Hardesty, 88 Md. 387.

It may be a matter of interest here to point to the origin of this rule probably in the Common Law principle of lapsing of rights upon the death of the person concerned. A very close parallel was the original Maryland view (changed by statute in 1810—Maryland Code of Public General Laws—1939, Article 93, sec. 340) that all devises and legacies lapsed upon the death of the devisee or legatee before the testator.

Livingston v. Safe Deposit Co., 157 Md. 492-501.
Helms v. Franciscus, 2 Bland (Maryland) 544-560.

Admittedly, no statute has been passed in Maryland which operates to prevent the lapsing of the appointment here to Robert by reason of his death before Sara Parker (R., p. 12).

II.

Maryland law as to partial invalidity of the Exercise of Special Powers of Appointment by Will.

We shall first discuss this point as to the inclusion of Robert, which we believe also disposes of the idea that the power was invalidly exercised when the donee (Sara Parker) omitted from her appointment her brother, Henry, whom she could not lawfully include.

A.

Petitioners contend that Sara Parker validly exercised the power as to the *three* subjects surviving when she drew her will. They further contend that the Maryland decision by its court of last resort in *Graham v. Whitridge*, 99 Md. 248, makes it mandatory, to hold here that the partial invalidity by reason of the *lapsing* of the appointment to *Robert* due to his death, did not void the entire exercise of the power, and that the appointments to the survivors, LeRoy and Mary Winder, are valid and effective. The District Court so held. We have quoted his language in the petition above.

In *Graham v. Whitridge*, the original testator, George Brown, bequeathed a fund in trust for his daughter, Grace Ann, for life. He gave her a power of appointment by will, operative if she died without issue. This contingency occurred. Under this provision, she had the power of appointment by will:

> "* * * to, and for such of my other children, or their descendants or descendant, and in such proportions, and for such estate or estates therein * * * as

> my said daughter, Grace Ann, may by her last will and testament * * * name limit and appoint to take the same". (99 Md. 270).

Acting under this power, Grace Ann left a will making a number of provisions for appointment of the fund in question to certain children and descendants of the testator, George Brown. Two of these provisions were held invalid as in violation of the rule against perpetuities (99 Md. 276). Chief Judge McSherry (one of Maryland's ablest Judges) wrote the opinion holding that the well appointed portions were valid and enforceable. In so determining, the Maryland Court merely followed the general rule adopted in England and well stated in the eminent authority, *Sugden on Powers* (99 Md. 280).

There is nothing peculiar about this Maryland rule. It is the one universally applied.

> 121 *A. L. R.* 1241.
> 49 *Corpus Juris,* p. 1301, sec. 136, note 13(a).
> 41 *American Jurisprudence,* p. 861, sec. 77.
> *Farwell on Powers,* p. 358.

The rule here contended for as controlling under the Maryland law is not a detached principle, applicable solely to testamentary law. It is the law of Maryland, and of all other jurisdictions, that when a statute contains both valid and invalid provisions, the valid portions will stand and be effective (even when contained in the same section) unless they are essentially and inseparably connected in substance.

> *Hall v. State,* 121 Md. 577-582.
> *Leser v. Lowenstein,* 129 Md. 244-264.
> 59 *Corpus Juris,* p. 639, sec. 205.

The same principle applies even to contracts.

> *Nicholson v. Ellis,* 110 Md. 322-333.
> 13 *Corpus Juris,* p. 515, sec. 472.

B.

The Circuit Court of Appeals refused to follow *Graham v. Whitridge,* supra, but elected instead to apply to this case the decisions in two other Maryland cases, which we respectfully urge are not in point here.

Myers v. Safe Deposit & Trust Company, 73 Md. 413.
Reed v. McIlvain, 113 Md. 40.

Judge Chesnut's opinion points out the inapplicability of these two cases:

> "The general rule is also recognized in Myers v. Safe Deposit & Trust Co., 73 Md. 413, and in Reed v. McIlvain, 113 Md. 140, in both of which cases, however, the exercise of the power was held wholly invalid because the donee, by blending her individual estate with that over which she had the power of appointment, and departing substantially from the limitations imposed by the donor in making the appointment, created such a confusing and unequal distribution that it was regarded as entirely inconsistent with the donor's general testamentary scheme." (R., p. 20).

Other basic facts distinguish these two cases. In *Myers v. Safe Deposit & Trust Co.,* the donee attempted to create trust estates in the appointed property which the power did not authorize. (73 Md. 420/421.) See a very clear distinction between *Myers v. Safe Deposit & Trust Co.* and *Graham v. Whitridge,* supra, in a case note in 121 *A. L. R.* 1241.

In discussing these two Maryland cases upon which the Circuit Court of Appeals relied, in preference to *Graham v. Whitridge,* the opinion of that court concluded with the following statement before the final paragraph (R., p. 46):

> "* * * and it is clear from a careful examination of the two cases in which total invalidity was declared

> that the result *depended not on the blending of assets but upon the determination of the court to effectuate* as far as possible the intention of the testatrix". (Italics are ours.)

This statement is directly in conflict with the final paragraphs in *Reed v. McIlvain*, the latest of the three cases, commenting on and quoting from *Graham v. Whitridge* (from 113 Md., page 150):

> "* * * 'In each and every instance, so far as we have been able to discover, there was either a blending of the individual property of the testator with that over which he had the power of appointment, or else as in the *McElfresh v. Schley* case (2 Gill 101), it was only the individual property of the testator which was disposed of.'
>
> "It is thus obvious that if Mrs. Greenway (she was the donee in Graham v. Whitridge) had blended her estate with her father's, the Court would have held that that case would have been governed by the decision in *Myers v. Safe Deposit and Trust Co.*, supra, and as Mrs. McIlvain did blend her estate with her father's, the decree of Judge Heuisler which nullified the entire attempted appointment of the settled estate without disturbing the disposition of Mrs. McIlvain's individual estate should be affirmed."

Briefly, in *Graham v. Whitridge* (and in the case at bar) some of the *persons* appointed were ineligible; such a condition does not invalidate the exercise of the power as to the other appointees. But in the two cases followed by the Circuit Court of Appeals, the donees handled the *property* appointed by them in such a way that the intentions of the original testators were completely frustrated.

C.

The Circuit Court of Appeals stated an alternative reason why the District Court's disposition of the estate was improper. It held that the power was a non-exclusive one (Sara could not omit any one of the four possible subjects). Petitioners do not acquiesce in this conclusion, but find it unnecessary to dispute it. The Circuit Court of Appeals further held that the entire exercise of the power was invalid because Sara Parker, the donee, excluded the deceased brother, Henry, from any benefit thereunder,—(R., pp. 40/41) but the opinion of that Court conceded that Henry was ineligible by reason of death (R., p. 39).

The Circuit Court of Appeals then decided that the Maryland law required it to declare the entire exercise of the power invalid merely because the donee of the power did not name as one of the appointees, a person who was totally ineligible, and who if included, must be excluded. The mere statement of this idea shows its unsoundness. No other court anywhere has ever reached such a conclusion.

This result is basically opposed to *Graham v. Whitridge*. If one could conclude that it is a technical violation to fail to include in the exercise of the power a subject who cannot be given a share, such an omission could not create an illegality in the exercise of the power in favor of other eligible appointees. *Graham v. Whitridge* sustains them.

But more extraordinarily still, the very authority cited by the Circuit Court of Appeals also refutes the fundamental proposition upon which that Court rests its conclusion on this point.

Not only does the quotation from section 361 of *A. L. I.—Restatement on Property—Future Interests,* in the opinion (R., p. 41) introduce the qualifying phrase *"then living"*, but also a few pages later in the text, this is stated:

A. L. I.—Restatement—Property—Future Interests, page 1992, Illustration under Section 361:

> "*c—Death of an object before the exercise of the power.*
>
> "When a power is non-exclusive, the death of an object permits a later appointment to the surviving members of the group. The appointment is not rendered ineffective by the fact that the estate of the deceased object is thereby prevented from receiving any part of the property in default of appointment. The estate is not an object of the power.
>
> *Illustration.*
>
> "5. A by will transfers $10,000 in trust for B for life and then in trust 'for all and every the children of B in such shares as B shall by will appoint and in default of appointment for the children equally.' Three children are born to B. One dies in B's life time. B by will otherwise effectively appoints to the other two. This is an effective appointment."

D.

With the conclusion that the exercise of the power was completely frustrated for these two reasons (whether regarded as alternative or cumulative, R., p. 46) the Circuit Court of Appeals proceeded to distribute the estate as if Sara Parker were *intestate* (R., p. 41). Admittedly, she was *not intestate*. She left a complete will. She exercised the power as far as it was possible to do so. The fact that two appointees were ineligible is immaterial. The authorities permit the exercise of the power even when there is only one eligible appointee.

41 *American Jurisprudence*, p. 853, note 9.

III.

The District Court's Disposition of the Entire Estate.

In following *Graham v. Whitridge*, Judge Chesnut held that the Maryland Law as well as the general law outside of that State (R., p. 20) compelled the finding that Sara Parker's appointment of shares equally to LeRoy Parker and Mary Winder disposed of two-thirds of the corpus. No Maryland case was available to control the disposition of the remaining third, but the District Court concluded that the English decisions (usually followed in Maryland) made it obligatory law to award the entire estate "in equal parts" (language of Donaldson will) to the two surviving appointees (R., pp. 25/27).

This is the only logical conclusion in a situation where, *first*, the power has been validly exercised, and, *second*, where the only persons eligible take the estate.

As the Circuit Court of Appeals found the entire exercise of the power invalid, it did not pass upon the issue of what to do with the third share attempted to be appointed to the pre-deceased Robert. We presume, however, if this Honorable Court finds that the Maryland law compels sustaining the partial exercise of the power, it will reinstate Judge Chesnut's disposition of the entire estate.

In this situation, we shall not discuss any other disposition of this matter until the briefs of respondents or some other development, makes further comment desirable.

It is obvious that Judge Chesnut was referring to the dispute about the disposition of this third share when he said in his opinion (R., top p. 19): "This is a question which is not free from difficulty of solution under the Maryland decision * * *". He could not have intended it to apply to the question of the Maryland Law as to partial invalidity in the exercise of special powers of appointment. His comments (R., p. 20) negative any such thought.

CONCLUSION.

The District Court interpreted the Maryland Law as he found it (R., p. 25), but he believed the disposition of the fund equally between the appointees living at the time that the exercise of the power became effective, by the death of the donee, is in line with what the donor and the donee intended (R., p. 26).

The Circuit Court of Appeals had a different idea (R., p. 43), though it had some difficulty harmonizing its own view. But it definitely appears from the appellate Court's award of one share for Henry, *first,* that Sara excluded him entirely from her will. He was dead; so was his widow and they were childless. This share, if sustained, will go to Respondent Catherine Ridgely Brown, a sister-in-law of Henry. It can be presumed that neither Mary Donaldson nor Sara Parker desired such a result.

Second, the other fourth share allotted to Robert goes to his widow, Sara's sister-in-law. It affirmatively appears that Sara did *not* want this result (R., p. 30).

We contend that the Circuit Court of Appeals struggled contrary to the Maryland law, to make a will for Mary Donaldson, but that its efforts were not as successful as the Maryland Law, literally applied by the District Court, accomplishes.

For the reasons stated, petitioners request that writs of certiorari issue as prayed.

Respectfully submitted,

JAMES MORFIT MULLEN,
Counsel for Petitioners.

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BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

EBEN J. D. CROSS,
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Counsel for Respondents.

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OPINIONS BELOW.

The opinion of the United States District Court for the District of Maryland (R. 8-28) is reported in 45 Fed. Supp. 451. The opinion of the Circuit Court of Appeals for the Fourth Circuit (R. 37-46) is not reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 30th, 1942 (R. 46). The petition for writs of certiorari was filed March 11, 1943. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by Act of February 13, 1925.

STATEMENT OF FACTS.

The only facts which are essential are:

1—Item "Second" of the will of Mary Donaldson provides:

> "Second: To my niece, Sara J. Parker, I give and bequeath the sum of Five Thousand Dollars ($5,000) absolutely; and the additional sum of Ten Thousand Dollars ($10,000) for and during her natural life and after her death I bequeath the said Ten Thousand Dollars ($10,000) to her brothers and sister of the whole blood in such proportions as she may designate by her last will and testament, but should she die intestate the said sum of money shall be divided among them equally." (R. 1)

2—The brothers and sister of the whole blood of Sara J. Parker living both at the time of the execution (1917) of the will of Mary Donaldson and her death (1920) were the same persons namely, Robert B. Parker, Henry P. Parker, LeRoy Parker and Mary D. Winder, and both parents of these parties died prior to the execution of the will (R. 4).

3—The pertinent portions of Sara Parker's will, dated March 23, 1927 are:

> "The fund of ten thousand dollars, under the will of my aunt Mary Donaldson (which said will is now of record among the Records of the Orphans' Court of Baltimore City), which I was to enjoy for life with

the right of disposition to my brothers and sister at my death, I give and bequeath in equal parts to my brothers LeRoy Parker and Robert B. Parker and my sister Mary D. Winder.

* * *

"All the rest and residue of my estate I give and bequeath to my brothers LeRoy Parker and Robert B. Parker and to my sister Mary D. Winder, share and share alike. I constitute and appoint Paul M. Burnett the executor of this my last will and testament" (R. 2 and 3).

4—Henry died February 15, 1925, Robert on August 2, 1940, Sara on November 12, 1940 and LeRoy on February 12, 1941. Mary Winder is still living (R. 4).

The Trial Court held "the appointment of Robert to a share ineffective" (R. 18) and awarded the whole fund to LeRoy and Mary Winder who survived Sara Parker (R. 26).

The Circuit Court of Appeals held "that the exercise of the power in the Parker will was totally ineffective", and reversed and remanded (R. 46) with the result that each of the four interests would receive a one quarter share under the will of the original testatrix, Mary Donaldson.

ISSUE PRESENTED.

The question at issue, therefore, is the effect of an ineffective exercise of a power of appointment and the sole reason assigned by Petitioners for seeking the issuance of writs of certiorari is that the Circuit Court of Appeals in holding that the exercise of the power was totally ineffective decided an important question of local (Maryland) law in a way probably in conflict with applicable local decisions.

ARGUMENT.

I. No Question of Importance Is Presented.

The petition discloses no special or important reason recognized by this Court as a proper occasion for the allowance of writs of certiorari.

No important question, except to the parties themselves, is involved in this case for several reasons.

First: The primary question is one of the construction of the two wills above referred to and giving effect to the intentions of the testatrices as shown therein. It is recognized in Maryland that a precedent in the construction of one will usually is of little importance in the construction of another. The reason for this is succinctly stated in *Nicodemus National Bank v. Snyder*, 178 Md. 140, 145: "It has been said that no will has a twin brother, this one is no exception."

Second: The unusual occurrence of a case of this character is clearly shown by the opinion of the District Court, which states (R. 20): "It is to be noted that no Maryland case has dealt with this particular factual situation." Mere novelty in an old field, we submit, is an indication not of importance, but of lack of importance.

The very novelty of this case also indicates that the Petitioners are mistaken in characterizing the power of appointment here involved as "customary" (Petition, p. 5).

Third: Whatever the field of law covering the subject of testamentary powers of appointment may have been in the past, it is likely to become less important in the future due to the provisions of the recent Act of Congress making property subject to powers of appointment includable, except as specified in the Act, in the estates of decedent donees of such powers, and therefore taxable in the estates

of both donors and donees. In other words, there will be fewer powers of appointment because of this Act. See Internal Revenue Code, Section 811 (f), as amended by Revenue Act of 1942, Sections 402 (a) and 403, as amended by P. L. 807—77th Congress (1942).

II. Since There Is No Maryland Case Directly In Point, Conflict of Decision Is Impossible.

The decision can not be in conflict with the Maryland decisions because there is no Maryland decision directly in point. The trial Judge, who decided the case in favor of the Petitioners, said:

> "The further question is then presented whether the naming of Robert in the will of Sara J. Parker is to be treated under the circumstances (1) as a mere nullity, thus giving the whole of the fund to the others named in equal shares, or (2) as a partial non-execution of the power with the result of (a) making the exercise of the power wholly invalid so that the whole fund devolved upon the four interests vested at the death of Mary Donaldson, or (b) only partially invalid with the result that only the one-third share appointed to Robert so devolved; or (c) with the result that, as the appointment could only validly be made by Sara to members of the class living at her death, the one-third unappointed share must also be equally divided between the two survivors at her death.
>
> "This is a question which is not free from difficulty of solution under the Maryland decisions, there being no Maryland case that presents a similar situation" (R. 18-19).

And again, he said:

> "But, as has been observed, it is to be noted that no Maryland case has dealt with this particular factual situation, and I fail to find in the Restatement any parallel case" (R. 20).

On the score of conflict of decision, the petition really raises no issue except whether or not the Circuit Court of Appeals correctly determined which Maryland cases were most nearly in point to control its own decision.

The above quotation also disposes, we think, of Petitioners' contention on page 17, that these remarks of the trial Judge were limited to the proper disposition of the one-third share appointed to Robert.

III. The Decision of the Circuit Court of Appeals Is Correct.

The Circuit Court of Appeals considered the case under two different methods of approach. Under each it found the exercise by Sara Parker of the power conferred upon her to have been wholly invalid, and accordingly it held that the fund in controversy passed by virtue of the will of the original testatrix in equal shares to the four beneficiaries, including the estates of the two who died before the donee of the power. In so doing, it rejected the claim of Robert Parker's estate to one-third of the fund, but upheld the claims of Robert's and Henry's estates to one-fourth each of the fund.

A. *The One Alternative.*

One of the Respondents contended in both the District Court and in the Circuit Court of Appeals that though the general rule was that a donee could not appoint to a person who was dead, such rule did not apply in this case because Mary Donaldson had made a direct gift of a vested remainder to the three brothers and one sister of Sara Parker coupled with a power in the latter merely to appoint the proportions in which they took, as distinguished from the gift of a power to the donee to give (R. 40). The

trial Court rejected this contention (R. 40). The Circuit Court said that it was not necessary to decide the point for even if the Respondent's contention were sound, Robert's executrix' claim for one-third was properly rejected for if Robert, though dead, were a proper object in whose favor the power might be exercised, then by the same token, Henry, though dead, could not be excluded, the power being a non-exclusive one (R. 40-41).

This involves no conflict with the rule quoted by the Petitioners from A. L. I. Restatement of Property, Sec. 361, to the effect that the death of an object of a non-exclusive power prior to the death of the donee does not defeat an appointment to surviving objects of the power. It is simply a holding that *if* (which the Circuit Court of Appeals did not decide) this case presented an exception to the rule that deceased persons cannot be included as appointees in the exercise of a power, then Henry as well as Robert would have to be included.

The Petitioners' criticism of this holding, on pages 15 and 16, to the effect that the Circuit Court held that the exercise of the power was invalid because the donee failed to name one of the appointees "who was totally ineligible, and who if included must be excluded" appears to be based upon an entire misconception of the Court's opinion, since what the Circuit Court said on this point was directed solely to rejecting the claim of the respondent, Robert Parker's executrix, to one-third of the fund.

B. The Other Alternative.

On the other hand, if the exercise of the power of appointment is ineffective for the reasons given by the trial Court, then the decision of the Circuit Court of Appeals is in accord with the Maryland cases nearest in point,

namely, *Myers v. Safe Deposit and Trust Company*, 73 Md. 413, and *Reed v. MacIlvain*, 113 Md. 141.

In the former, the donee exceeded the power given her by creating a trust, which she had no authority to do, as to part of the property subject to the power. The Court in that case said (73 Md. 413, 423):

> "If by following that statement of the law [that well appointed portions ordinarily stand] made by Mr. Sugden we would defeat the manifest intention of Charles Myers [the donor] in respect to his estate, and also the whole scheme and purpose of the will of Mrs. Myers, the donee of the power, we do not think we ought to do such violence to the intentions of those testators."

In *Reed v. MacIlvain* where the donee violated the rule against perpetuities in appointing a part of the property subject to the power, the Court approved and followed the Myers case, and after quoting from that case to the effect that it would better meet the wishes of both testators to treat the attempted exercise of the power as wholly abortive, said, at page 148:

> "To no case could the foregoing language be more forcibly and justly applied than the one now before us where to hold otherwise would be to introduce a shocking inequality between children of the donee of the power apparently equally meritorious and dear to her."

The Circuit Court of Appeals, after referring to these two cases (R. 43-45) and to *Graham v. Whitridge*, 99 Md. 248 (R. 45) and noting that there was blending of assets of the donor's estate with assets of the donee's estate in the two former cases and that there was no such blending in the Graham case (R. 46) and after further noting that

blending was discussed in *Graham v. Whitridge*, in connection with the equitable doctrine of election, said:

> * * * *"This doctrine has not been invoked by any party in the pending case;* and it is clear from a careful examination of the two cases in which total invalidity was declared that the result depended not on the blending of assets but upon the determination of the Court to effectuate as far as possible the intention of the Testatrix." (R. 46) (Italics supplied).

Judge Soper's opinion is, therefore, not only in full accord with *Myers v. Safe Deposit* and *Reed v. MacIlvain* but is not at all in conflict, as alleged by petitioners on page 14, with that portion of the opinion in the latter case wherein the Court said, in referring to the case of *Graham v. Whitridge* that had the donee blended her estate with that of the donor it would have been held that her attempted exercise of the power was wholly abortive. The reason for this statement is perfectly plain. There are two exceptions to the rule that where one part of an appointment is ineffective, and another part would, if standing alone, be effective, the latter is given effect except (1) where there is a mingling or blending, or (2) where the donee's scheme of disposition is more closely approximated by holding the exercise of the power wholly abortive. (R. 41-42). See Restatement—Property—Future Interests, Sec. 362.

It is also to be noted that the Court of Appeals of Maryland in *Reed v. MacIlvain* did not say that only if there were blending could the exercise of a power be held to be wholly abortive, but only that if there had been blending in *Graham v. Whitridge* that case would have been decided the other way.

And the quotation on page 14 of the petition taken from *Graham v. Whitridge* refers to the doctrine of election,

as appears from reading pages 285 to 288 of that case. As pointed out by Judge Soper (R. 46) "that doctrine has not been invoked by any party in the pending case."

In connection with the cases of *Myers v. Safe Deposit* and *Reed v. MacIlvain,* and if it be of any importance, the Respondents did not at any stage of proceedings abandon their alternative position of relying on these cases, as suggested by the Petitioners on page 6 of the petition, as appears from the motion filed by them for a new trial, in which it was stated:

> "These defendants also respectfully adhere to each and every argument advanced by brief and oral argument at the trial of this case, *including the argument based upon Myers v. Safe Deposit and Trust Company,* 73 Md. 413." (R. 30) (Italics supplied).

Of the case of *Smith v. Hardesty,* 88 Md. 387, referred to by the Petitioners on page 10, the Court of Appeals of Maryland in *Allder v. Jones,* 98 Md. 101, 108 said:

> "All that was decided in the case of *Smith v. Hardesty,* is, that under the power to devise to the child or children of the donor, the donee had no power to devise the property to a grandchild and charge the property so devised with the payment of a legacy to the appointor's sister."

IV. Rebuttal.

The cases cited on page 5 of the petition of *Rhulin v. New York Life Insurance Company,* 304 U. S. 202, 205 and *Fidelity Trust Company v. Field,* 311 U. S. 169, 177, ostensibly to support the proposition that the instant case is governed by the local law, which nobody disputes, are both cases in which certiorari was granted. However, on the latter point they are inapplicable to the instant case. In the former case, certiorari was granted because of a

conflict of circuits. In the latter, the Circuit Court of Appeals took the view that they were not bound by the pronouncements of state courts other than state courts of last resort. Upon certiorari being granted this ruling was held to be erroneous. Obviously, this has no application to the instant case.

See also *West v. A. T. & T. Company*, 311 U. S. 223, in which a Circuit Court of Appeals held that it was not bound to follow the decision of an intermediate appellate court of the state and so was free to adopt and apply what it considered to be the better rule. The Court said at page 237:

> "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

In the case at bar the Circuit Court of Appeals gave over two pages (R. 43-46) of its opinion to the consideration of the three cases in Maryland, namely, *Myers v. Safe Deposit, Graham v. Whitridge* and *Reed v. MacIlvain*, having to do with the results flowing from an ineffective exercise of a power of appointment and came to the conclusion, rightly we submit, that the instant case more nearly resembled the cases of *Myers v. Safe Deposit* and *Reed v. MacIlvain* and in consequence held the exercise of the power wholly ineffective.

V. Conclusion.

The decision of the Circuit Court of Appeals is correct and presents neither a conflict with the Maryland decisions nor a question of substance or general importance. The petition should be denied.

Respectfully submitted,

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March 19, 1943.